

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 27, 2009 at Knoxville

STATE OF TENNESSEE v. JEFF OOLEY

Appeal from the Circuit Court for Warren County
No. F-11468 Larry B. Stanley, Jr., Judge

No. M2008-01193-CCA-R3-CD - Filed March 3, 2009

The defendant, Jeff Ooley, pleaded guilty to two counts of facilitation of attempted second degree murder, *see* T.C.A. §§ 39-11-403; 39-12-101; 39-13-210 (2006), and two counts of aggravated assault, *see id.* § 39-13-102(a)(1)(B). The defendant applied for judicial diversion, *see id.* § 40-35-313; however, the trial court denied his request and sentenced him to serve 365 days in the Warren County Jail with the remainder his effective four-year sentence to be served on probation. The defendant appeals, claiming that the trial court erred in denying judicial diversion. Discerning no error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Circuit Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Dan T. Bryant, McMinnville, Tennessee (at trial); and Trenena G. Wilcher, McMinnville, Tennessee (on appeal) for the appellant, Jeff Ooley.

Robert E. Cooper, Jr., Attorney General and Reporter; Melissa Roberge, Assistant Attorney General; Lisa S. Zavogiannis, District Attorney General; and Mark E. Tribble, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On February 8, 2008, a Warren County Grand Jury indicted the defendant and his wife, Pam Ooley, on two counts of attempted first degree murder, *see* T.C.A. §§ 39-12-101; 39-13-202, and indicted the defendant on four counts of aggravated assault, *see id.* § 39-13-102. On February 13, 2008, the defendant entered into a plea agreement and pleaded guilty to two counts of facilitation to attempt to commit second degree murder, a Class C felony, and two counts of aggravated assault, also a Class C felony. Defense counsel also “request[ed] that the [d]efendant be given judicial diversion in this matter.”

After holding a sentencing hearing on April 9, 2008, the trial court sentenced the defendant to four years' incarceration for the facilitation convictions and three years' incarceration for the aggravated assault convictions and ordered that all sentences run concurrently. The trial court ordered the defendant to serve 365 days' imprisonment in the Warren County Jail and to serve the remainder of his sentence on probation. As conditions of his sentence, the court ordered that the defendant "shall be on supervised probation, surrender his firearm carry permit[, and] cannot possess any firearm(s)." The trial court also ordered the defendant to "complete an alcohol and drug assessment and follow all recommendations." Additionally, the trial court ordered restitution in the amount of \$20,618.03 to victim Brent Newby.

Because the defendant pleaded guilty and no trial determined the facts of the offense, we glean the facts from transcript of the plea submission hearing, the presentence report and the defendant's sentencing hearing testimony. On December 31, 2007, the defendant and his wife, Pam Ooley, went to dinner to "kind of celebrat[e] the tenth anniversary of [their] very first date." Before going to dinner, the defendant "had [his] normal dose of . . . anxiety medicine," and Ms. Ooley took medicine including "a lot of prescriptions for a heart problem and . . . Xanax." Although they "normally don't drink," they consumed alcoholic beverages at dinner and then returned home.

Upon arriving home, they discovered that "one of [their] dogs was sick." Ms. Ooley "became upset about the dog being sick and called [their nephew, Timmy Bates] and was more or less blaming him because he had give[n] [them] a dog." While Ms. Ooley argued with Mr. Bates over the telephone, "somehow or other [Brent] Newby got involved in the phone conversation." According to the defendant, Mr. Newby made "sexual allegation[s]" toward Ms. Ooley and threatened to "blow [the defendant's] head off." After the phone call, Ms. Ooley "took more medicine," and they both consumed more alcohol. Ms. Ooley began crying and "got all upset that she needed to make amends with her nephew, that she was real close to him and didn't want to lose him as a nephew." She argued with the defendant because "she wanted to go out to where [Mr. Bates and Mr. Newby] were at riding horses." The defendant attempted to calm her and told her to "let it go"; however, she insisted on finding Mr. Bates and Mr. Newby, and he eventually "g[a]ve in."

The defendant and Ms. Ooley retrieved guns from their home because of Mr. Newby's threats and went to find the men. They drove around for "20 or 30 minutes" looking for "these kids on horses." Ms. Ooley called Mr. Bates, who told her that they were at a church in Centertown. Upon arriving at the church, the defendant and Ms. Ooley discovered nobody was there. Ms. Ooley again called Mr. Bates, and "all of them laughed at her because they had sent her on a wild goose chase." Ms. Ooley then called Mr. Bates's wife, Ashley Bates, and learned the true location of Mr. Bates and Mr. Newby.

They followed Ms. Bates's instructions and "encountered the group of horse riders." The defendant exited the vehicle and told his wife to stay in the car "until [he] could go assess the situation." He approached Mr. Newby, who attempted to tell the defendant that his name was "Jason." The defendant had his pistol in "a bag-like thing [he] carried it in." The defendant had a

carry permit for the pistol. He explained, "I might have pulled it out but I don't remember like pointing it at Tim Bates." The defendant testified, "At that point in time Tim Bates jumped off his horse and said he was going to kick my ass." As the defendant turned toward Mr. Bates, Ms. Ooley fired "three quick shots," which the defendant thought were "warning shots to protect [him]."

After Ms. Ooley fired the first three shots, she and Mr. Bates entered "a cussing match" from "a good hundred feet" away. The defendant then started "chastising" Mr. Newby for making sexual allegations toward his wife, but Mr. Newby maintained that his name was "Jason." The defendant stated, "[A]bout that time [Ms. Ooley] said, Brent [Newby], you're lying, I recognize your voice from the phone and then, pow, pow, pow, three more shots went off." Mr. Newby yelled, "Ow," and then he "took off" with his horse. The defendant "grabbed" the rifle from his wife, and "she started screaming, no, no, no, I was shooting up in the air." About one-eighth of a mile down the road, the defendant encountered Mr. Newby "throwing something, looked like a weapon, into someone's yard." At that point the defendant thought that Mr. Newby was not injured, so he and his wife returned home. He hid the rifle in an "[e]laborate hiding place" at his home.

Approximately 15 minutes after arriving home, law enforcement officers arrived at their residence. The defendant was taken into custody; however, he gave the officers a detailed explanation of what happened. He testified, "From the very beginning I wanted to make things right," and he "wish[es] every day that [he] hadn't drove out there."

Additionally, the defendant testified at the sentencing hearing that he grew up in Indiana and had accumulated approximately 100 credit hours from attending both Purdue University and Indiana University-Purdue University Indianapolis. He had lived in Tennessee since 1997, and he met Ms. Ooley, his wife, in Tennessee. He testified that he had worked several steady jobs over his ten years in Tennessee, but when Ms. Ooley had a heart attack in March 2007, he quit his job, which required traveling, to stay with her. He "picked up odd jobs" around town during this time, but the couple did not have health insurance.

The defendant's father, Charles Ooley, testified that he lived in Indiana, and he had arranged for the defendant's employment in Indiana if he were allowed to transfer his probation or parole. He said, "[The defendant] is a carpenter by trade. I have a friend . . . in our location and he's agreed to give [the defendant] a [Union] card . . . and put him to work." Mr. Ooley testified that the defendant could live with him until "he can get established and get his own place." He stated that he was "shocked" and "c[ouldn't] believe" that his son, the defendant, committed the alleged acts. He testified, "I raised him better than what he is right now," and he stated that the defendant would successfully complete any alternative sentence.

Eddie Pack and Troy Sullens testified that they knew the defendant from church. Both men testified that they were surprised to learn about the incident. Mr. Pack testified that he thought it "out of character" for the defendant to participate in the incident. He described the defendant as "an honest person . . . an intelligent person." Mr. Sullens described the defendant as "very intelligent and a hard worker." Mr. Pack had spoken with the defendant since the incident, and

he testified that, despite his involvement in the incident, he maintained a high opinion of the defendant.

Brent Newby testified that, because of a gunshot wound to his stomach inflicted by Ms. Ooley, he had to be flown by helicopter to Chattanooga for treatment. He remained in the hospital for a week. He testified that he submitted a claim to the victim's fund for compensation but never received assistance. He testified that he had no health insurance, and he said, "They've . . . been calling saying that I need to pay up or they're fixing to turn [my bills] over to the collection agents." He stated that he would like help from the defendant with paying his medical bills. Mr. Newby testified that, since the incident, he is "more leery" of people. He did not have a personal relationship with the defendant prior to the shooting.

At the close of proof, the trial court considered the testimony, the circumstances surrounding the incident, the presentence report, and the mitigating and enhancing factors in determining the defendant's sentence of four years' and three years' incarceration, respectively, for the facilitation and aggravated assault convictions. The trial court then considered whether the defendant was suited for probation or other alternative sentencing. The trial court noted the defendant's lack of a criminal record and stated "there are some [factors] that weigh heavily in [the defendant's favor]." The trial court, however, stated "it's very important that a penalty be established . . . that deters others from committing similar offenses." The trial court stated, "We have people around here in this region that . . . still think it's the 1820s or 1830s or something. They carry pistols around and go get in fights." The court reasoned that "serious punishment" was needed to prevent others from "engaging in activities like this for whatever reason" and that "to go looking for [a fight] with deadly weapons is a bad example to set for other people." The trial court noted that "full probation would depreciate the seriousness of the offense, especially a facilitation of attempted homicide." The trial court then ordered the defendant to serve 365 days in the Warren County Jail and to serve the remainder of the sentence on probation.

The trial court entered a written order on May 12, 2008, specifically denying the defendant's request for diversion. The trial court stated that it considered the seven factors listed in *State v. Electroplating, Inc.*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998), and other factors in denying judicial diversion. The trial court found "particularly disturbing" that the defendant and his wife "engaged in behavior that was likely, if not designed, to place persons in great physical danger." It noted, "The wild-west mentality of violent retribution when no present danger exists must not be excused as a slight err[or] in judgment." The trial court determined that judicial diversion "would unduly depreciate the seriousness of the offense and would not serve to deter others who might choose to engage in such behavior."

The defendant appeals from the denial of diversion, alleging that the trial court abused its discretion in denying diversion without properly considering all factors, citing *Electroplating, Inc.*, 990 S.W.2d at 229.

“Judicial diversion” is a reference to the provision in Tennessee Code Annotated section 40-35-313(a) for a trial court’s deferring proceedings in a criminal case. *See* T.C.A. § 40-35-313(a)(1)(A). Pursuant to such a deferral, the trial court places the defendant on probation “without entering a judgment of guilty.” *Id.* To be eligible or “qualified” for judicial diversion, the defendant must plead guilty to, or be found guilty of, an offense that is not “a sexual offense or a Class A or Class B felony,” and the defendant must not have previously been convicted of a felony or a Class A misdemeanor. *Id.* § 40-35-313(a)(1)(B)(i)(b), (c). Diversion requires the consent of the qualified defendant. *Id.* § 40-35-313(a)(1)(A).

Eligibility, however, does not automatically translate into entitlement to judicial diversion. *See State v. Bonestel*, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000). The statute states that a trial court may grant judicial diversion in appropriate cases. *See* T.C.A. § 40-35-313(a)(1)(A) (2006) (court “may defer further proceedings”). Thus, whether an accused should be granted judicial diversion is a question entrusted to the sound discretion of the trial court. *Bonestel*, 871 S.W.2d at 168.

“Tennessee courts have recognized the similarities between judicial diversion and pretrial diversion and, thus, have drawn heavily from the case law governing pretrial diversion to analyze cases involving judicial diversion.” *State v. Cutshaw*, 967 S.W.2d 332, 343 (Tenn. Crim. App. 1997). Accordingly, the relevant factors related to pretrial diversion also apply in the judicial diversion context. They are:

[T]he defendant’s criminal record, social history, mental and physical condition, attitude, behavior since arrest, emotional stability, current drug usage, past employment, home environment, marital stability, family responsibility, general reputation and amenability to correction, as well as the circumstances of the offense, the deterrent effect of punishment upon other criminal activity, and the likelihood that [judicial] diversion will serve the ends of justice and best interests of both the public and the defendant.

Id. at 343-44; *see also State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993).¹ Moreover, the record must reflect that the trial court has weighed all of the factors in reaching its determination. *Bonestel*, 871 S.W.2d at 168. The trial court must explain on the record why the defendant does not qualify under its analysis, and if the court has based its determination on only some of the factors, it must explain why these factors outweigh the others. *Id.*

On appeal, this court must determine whether the trial court abused its discretion in failing to grant judicial diversion. *Cutshaw*, 967 S.W.2d at 344; *Bonestel*, 871 S.W.2d at 168.

¹We note these factors are presented slightly differently than the seven factors set forth in *Electroplating, Inc.*, 990 S.W.2d at 229, which is cited by the defendant and the trial court; however, we observe the factors, as listed above, include all seven *Electroplating, Inc.* factors.

Accordingly, when a defendant challenges the denial of judicial diversion, we may not revisit the issue if the record contains any substantial evidence supporting the trial court's decision. *Cutshaw*, 967 S.W.2d at 344; *Bonestel*, 871 S.W.2d at 168.

In denying the defendant's request for judicial diversion, the trial court considered all necessary factors. The trial court explained, at the sentencing hearing and in its written order, its reasons for denying diversion, and we hold that the trial court did not abuse its discretion in denying judicial diversion. At the sentencing hearing, the trial court considered, on the record, the defendant's lack of a criminal record, his physical and mental health, and his social history. The trial court thoroughly explained its consideration of the defendant's amenability to correction, stating, "I think you're someone who hopefully in the long run would not commit an offense like this in the future but I think it was quite a surprise to everybody that you did it to begin with. So it's not easy to say that it wouldn't happen again." As described above, the trial court found that the circumstances of the offense and the deterrence value of the sentence outweighed the other factors.

The trial court's written order denying judicial diversion explicitly states that it considered the *Electroplating, Inc.* factors in its decision, and we note that the trial court implicitly made the same considerations in determining diversion as it made during the sentencing hearing in determining the defendant's eligibility for alternative sentencing. The trial court noted that the defendant and his wife became intoxicated and, while in an angered state, armed themselves and drove to search for the victims. The trial court also "[took] judicial notice of the substantial number of cases in this district in the past five years which involved firearms and usually alcohol. This is the type of behavior that needs to be severely curtailed." The trial court acted within its discretion in denying judicial diversion in the interests of justice. The trial court clearly weighed all required factors in determining whether judicial diversion was appropriate. The evidence substantially supported the trial court's decision, and we will not disturb its findings.

Because the evidence adduced at the sentencing hearing and from the presentence report supports the trial court's reasoning and the trial court considered all relevant factors in denying the defendant's request for judicial diversion, we affirm the judgments of the trial court.

JAMES CURWOOD WITT, JR., JUDGE